83-1029

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

5 CIV. No. 6622

MITSUE TAKAHASHI, *Petitioner*

vs.

GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT; LIVINGSTON UNION SCHOOL DISTRICT OF THE COUNTY OF MERCED, STATE OF CALIFORNIA; COMMISSION ON PROFESSIONAL COMPETENCE; AND DOES I THROUGH V, INCLUSIVE, *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIFTH APPELLATE DISTRICT

MITSUE TAKAHASHI, *Petitioner*

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QUESTION PRESENTED

Whether the dismissal of a tenured public school teacher, whose students have met or exceeded all established academic goals, for failure to "maintain a suitable learning environment" in the absence of objective standards or guidelines against which to evaluate her performance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIFTH APPELLATE DISTRICT

Petitioner MITSUE TAKAHASHI respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California in and for the Fifth Appellate District entered in the above-entitled action on June 20, 1983.

OPINIONS BELOW

On November 16, 1980, respondent COMMISSION ON PROFESSIONAL COMPETENCE of the LIVINGSTON UNION SCHOOL DISTRICT issued its decision dismissing petitioner from her teaching position at the Livingston Union School District.

On June 9, 1981, the Superior Court for the County of Merced, State of California, sustained the findings of respondent COMMISSION ON PROFESSIONAL COMPETENCE and entered judgment denying petitioner's writ of mandate. That judgment is printed in Appendix A hereto, *infra*, page 1.

The Court of Appeal of the State of California in and for the Fifth Appellate District affirmed the judgment of the Superior Court for the County of Merced in an opinion filed on June 20, 1983. That opinion is printed in Appendix A hereto, *infra*, page 2, and is reported at 44 Cal. App. 3d. 27 (1983).

The Court of Appeal of the State of California in and for the Fifth Appellate District denied petitioner's petition for rehearing on July 14, 1983. That order is printed in Appendix A hereto, *infra*, page 16.

On August 17, 1983, the California Supreme Court denied petitioner's request for hearing, R. Bird, C. J., dissenting. That order is printed in Appendix A hereto, *infra*, page 18.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section 1.

2. California Education Code §§ 44660 and 44662.

The full text of these constitutional and statutory provisions is set out in Appendix B hereto.

QUESTION PRESENTED

Whether the dismissal of a tenured public school teacher, whose students have met or exceeded all established academic goals, for failure to "maintain a suitable learning environment" in the absence of objective standards or guidelines against which to evaluate her performance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF CASE

Petitioner MITSUE TAKAHASHI, a graduate of Stanford University and a veteran educator with twenty-one years of teaching experience, was discharged from her junior high school teaching position by respondent LIVINGSTON UNION SCHOOL DISTRICT in 1980 on the grounds of incompetency. Respondent's charges of incompetence were based solely upon petitioner's alleged failure to "maintain a suitable learning environment." Yet it is undisputed that petitioner was consistently successful in insuring that every one of her students met or exceeded all of the academic goals established by respondent LIVINGSTON UNION SCHOOL DISTRICT. (Appendix A, *infra*, page 10, fn. 4.)

Prior to 1978 respondent LIVINGSTON UNION SCHOOL DISTRICT noted no deficiencies in petitioner's job performance. Greg Fitzgearl, petitioner's principal from approximately 1967 to 1977, visited petitioner's classroom thirty to forty times per year and gave her uniformly good evaluations. (RT 216-217, 221). In 1977 Dale Eastlee as-

sumed the position of principal with little experience in junior high school administration. (RT 34) In 1978 he began observing some incidents which in his opinion indicated that petitioner's classroom was not orderly.

At the hearing before respondent COMMISSION ON PROFESSIONAL COMPETENCE, Mr. Eastlee admitted that he had no independent recollection of any of the incidents forming the basis of the charges against petitioner and that he could not recall what petitioner had stated to him regarding such incidents during his conferences with her. (RT 56-57).

Mr. Eastlee left respondent LIVINGSTON UNION SCHOOL DISTRICT in 1979 and was replaced by Hamilton Brannan, who also documented situations which he felt showed that petitioner was an inadequate disciplinarian. However, in the 1979-80 academic year, petitioner was assigned an eighth grade class with a disproportionate number of problem students, several pupils with significant language handicaps, and a child requiring special education instruction. (RT 222-223, 323, 369). Even though her teaching colleagues were unaware that petitioner was being considered for dismissal, they talked among themselves about the unfair burden placed upon her by such assignments. (RT 204, 222-223).

Despite these obstacles, all of petitioner's students met the 1979-1980 academic goals established by the principal. (RT 182, Appendix A, *infra*, page 10, fn. 4). In 1980, however, Mr. Brannan recommended that petitioner be discharged for failing to properly control her junior high school pupils. On June 26, 1980 the Board of Trustees of respondent LIVING-

STON UNION SCHOOL DISTRICT issued petitioner a Notice of Intention to Dismiss.

The allegations that petitioner failed to "maintain a suitable learning environment" were based upon such incidents as two students fighting upon entering her classroom, students responding spontaneously to her questions without raising their hands, a pupil uttering an obscenity in class without being reprimanded by petitioner, and two boys wrestling and yelling outside the back door of her classroom. (Appendix A, *infra*, pages 4-5).

After she was recommended for dismissal, petitioner was assigned to the position of substitute teacher in the 1980-81 academic year and performed her job duties in an excellent fashion. (RT 329). She also served as a resource teacher, a position in which she was so successful that the teachers wrote to respondent LIVINGSTON UNION SCHOOL DISTRICT urging her retention in that capacity. (CT 129).

It is undisputed that neither the respondent GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT nor petitioner's principals ever established any objective, uniform guidelines or standards to evaluate whether petitioner was sufficiently controlling her class or "maintaining a suitable learning environment." (RT 184). Moreover, respondents admitted that no objective comparisons were made between petitioner's eighth grade classroom and other eighth grade classrooms or between the learning achieved by petitioner's students and those in other classes. (RT 184, 161-162, 164).

Despite the lack of any objective standards, criteria, or

guidelines against which to judge petitioner's performance, respondent COMMISSION ON PROFESSIONAL COMPETENCE of LIVINGSTON UNION SCHOOL DISTRICT voted 2-1 to discharge petitioner for failing to "maintain a suitable learning environment." (RT 27, 82, CT 190-192).

On December 4, 1980 petitioner filed a writ of mandate with the Merced County Superior Court on the grounds that her dismissal violated her rights not to be deprived of property or liberty without due process of law in contravention of the Stull Act, specifically Education Code §§ 44660 and 44662, which requires school boards to "establish a uniform system of evaluation and assessment of the performance of all certificated personnel" which "shall involve the development and adoption by each school district of objective evaluation and assessment guidelines." Although it was again undisputed that no such guidelines were ever established by respondents to assess whether petitioner was "maintaining a suitable learning environment", the Superior Court entered judgment denying the petition for writ of mandate. (Appendix A, *infra*, page 1).

The Court of Appeal of the State of California in and for the Fifth Appellate District affirmed the judgment of the trial court. It reasoned that petitioner's discharge did not violate the Stull Act because the statutory requirement of Education Code §§ 44660 and 44662 that school boards establish objective guidelines for evaluation of personnel does not specify that school boards cannot dismiss teachers in the absence of such mandated guidelines. In response to petitioner's arguments that the dismissal violated her Fourteenth Amendment rights to due process of law, the Court of Ap-

peal decided that discharges for incompetence are exempted from the constitutional requirement that objective standards be utilized in dismissing public school teachers. (Appendix A, *infra*, page 13).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH BOTH FEDERAL AND STATE DECISIONAL LAW REGARDING A SUBSTANTIAL AND IMPORTANT FEDERAL QUESTION

The California Court of Appeal's interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution as it applies to teacher dismissals conflicts not only with the federal case law but also with the decisions of the California Supreme Court.

In the seminal case of *Connally v. General Construction Company*, 269 U.S. 385, 392, 46 S. Ct. 126, 70 L.Ed. 322 (1927) the United States Supreme Court determined that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." This requirement applies to civil as well as criminal cases, *Jordan v. De George*, 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951), and specifically to public teacher dismissals. *Cramp v. Board of Instruction of Orange County, Florida*, 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961).

It is clear that dismissal criteria must be "sufficiently specific to fulfill the dual requirement of enabling the pro-

fessor to guide his conduct and providing a definite standard by which the professor's conduct can be evaluated." Note, *Dismissing Tenured Faculty: A Proposed Standard*, 54 N.Y.U.L. Rev. 827, 834 (1979). *See also* Rosenberger & Plimpton, *Teacher Incompetence and the Courts*, 4 J. L. & EDUC. 469, 469-70 (1975). As the scholars have commented,

> Court interpretation, extrapolation, and rule promulgation have been necessary to 'make more definite and certain the inexact standards created by the legislature' or adopted by the governing board and to give meaning to the term 'academic tenure.' Note, *Academic Tenure: The Search for Standards*, 39 S. CAL. L. REV. 593, (1966).

See also, Black, *Attorney Discipline for "Offensive Personality" in California*, 31 HASTINGS L. J. 1097, 1127-28 (1979-80). Note, *License Revocation: Uncertainty and Due Process*, 15 HASTINGS L. J. 339 (1963-64).

For example, in *Burton v. Cascade School District Union High School*, 353 F. Supp. 254 (D. Oregon 1973), Ms. Burton was dismissed from her teaching position for "immorality" based upon her admission that she was a practicing homosexual. The court found such a criterion for discharge to be unconstitutionally vague because:

> . . . [t]he statute does not define immorality. Immorality means different things to different people, and its definition depends upon the idiocyncracies of the individual school board member. It may be applied so broadly that every teacher in the state could be subject to discipline. The potential for arbitrary and discriminatory enforcement is inherent in such a statute. 353 F. Supp. at 255.

Precisely the same condemnation could be made of the phrase "maintenance of a suitable learning environment." Placing such discretion with school board members, the court stated, "subjects the livelihood of every teacher in the state to the irrationality and irregularity" of their judgments. 353 F. Supp. at 255.

In *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. N.D. 1970), a high school teacher was discharged for assigning reading which had a "disruptive effect" on her students and for insubordination in contending that she thought such reading to be appropriate. Numerous parents complained and three students asked to be excused from the assignment.[1]

The teacher challenged her discharge on the grounds that the school district had "no written or announced policy . . . governing the selection and assignment of outside materials." 316 F. Supp. at 356. In ruling that her dismissal violated the Due Process Clause, the court stated:

> Our laws in this country have long recognized that no person should be punished for conduct unless such conduct has been proscribed in clear and precise terms . . . When a teacher is forced to speculate as to what is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on the part of the teacher to investigate and experiment with new and different ideas is anathema to the entire concept of academic freedom. 316 F. Supp. at 352.

See also Dean v. Timpson Independent School District, 486 F. Supp. 302, 308-309 (1979).

[1]There was greater parental and student opposition concerning this one incident than was shown by students and parents in petitioner's case during the entire three years she was allegedly incompetent.

The California Supreme Court has closely followed the federal precedents in applying the Due Process Clause to teacher dismissals. In *Morrison v. State Board of Education*, 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461, P. 2d 375 (1969), the Supreme Court upheld a challenge to the revocation of a teaching certificate for immoral and unprofessional conduct and acts involving moral turpitude pursuant to the then Education Code § 13202 [now Education Code § 44932 (a)]. Morrison, who had engaged in a homosexual relationship with a fellow teacher, contended that the words "unprofessional conduct", "immoral conduct", and "moral turpitude" were so vague that the revocation of his diploma on such grounds denied him due process of law. 1 Cal. 3d. at 230-231.

The court concluded that Education Code § 13202 could only withstand constitutional attack on vagueness grounds by a judicial interpretation of the phrases "unprofessional conduct", "immoral acts", and "moral turpitude" which required the trier of fact to find that the teacher was "unfit to teach" according to several specific criteria established by the court. 1 Cal. 3d. at 229.

Noting that statutes must be "sufficiently clear as to give a fair warning of the conduct prohibited, and must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies," the court determined that dismissal criteria such as "immoral conduct", "unprofessional conduct", and "moral turpitude" without a narrowing standard set by the courts "would be susceptible to so broad an application as possibly to subject to discipline virtually every teacher in the state." 1 Cal. 3d. at 231-225.

> A sweeping provision purporting to penalize or sanction so large a group of people as to be incapable of effective enforcement against all or even most of them necessarily might offend due process. Such a statute, *unless narrowed by clear and well-known standards,* affords too great a potential for arbitrary and discriminatory application and administration. (emphasis mine) 1 Cal. 3d. at 225.

San Dieguito v. Commission on Professional Competence, 135 Cal. App. 3d. 278, 185 Cal. Rptr. 203 (1982), made it clear that the standards established in *Morrison, supra,* are not limited to teacher dismissals for unprofessional or immoral conduct. In *San Dieguito,* a teacher was discharged for excessive absenteeism which allegedly interfered with the teaching process. She had received numerous written and oral warnings regarding the "negative effects" of her absenteeism so she was clearly "on notice" that the school district was concerned about her behavior. 185 Cal. Rptr. at 205.

The court found that the phrase "evident unfitness to teach" was subject to the same constitutional objections as "immoral conduct" and "unprofessional conduct". Hence, according to the court, "without the *Morrison* standards 'evident unfitness to teach' would be vulnerable to such a broad application virtually every teacher in the state could be subject to discipline and discharge." 185 Cal. Rptr. at 206. Hence, the Commission on Professional Competence must use an "objective and analytical approach" considering all the *Morrison* guidelines in determining fitness to teach: (1) likelihood of recurrence of the questioned conduct; (2) extenuating or aggravating circumstances; (3) effect of notoriety and publicity; (4) impairment of teacher-student

relationships; (5) disruption of the education process; (6) motive; and (7) proximity or remoteness in time of conduct.

The court concluded that:

> The *Morrison* standard gives substance to the tenured teacher's right to be discharged only for cause. If the *Morrison* standards are not applied, the teacher is left essentially at the mercy of the Board (or the trial court) to be discharged whenever cause exists in the subjective estimation of either body. Such a procedure would make a shambles out of the tenure and job security now enjoyed by teaching employees. 185 Cal. Rptr. at 208.

These same "fitness to teach" criteria were applied in *Blodgett v. Board of Trustees*, 20 C.A. 3d. 183, 97 Cal. Rptr., 406 (1971), in which a probationary teacher of physical education was denied re-employment because her obesity allegedly restricted her ability to perform her teaching duties. The evidence showed that she was unable to demonstrate certain movements in class because of her size, that she was often the object of ridicule when she utilized physical educational techniques, and that some students declined to take her classes and made derogatory comments about her weight. She was observed several times on a weekly basis by a teacher who testified that her weight interfered with her effectiveness as a teacher. 20 C. A. 3d at 186-189. However, because the Board of Trustees had failed to demonstrate by the *Morrison* criteria mandated by the Fourteenth Amendment that she was unfit to teach, the court entered judgment for the teacher.[2]

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[2]Similarly, in *Blake v. State Personnel Board*, 25 C.A. 3d. 541, 102 Cal. Rptr. 50 (1972) a deputy labor commissioner was dismissed from state employment for "discourteous treatment of other employees" when he pointed a gun at them. The court stated:

In marked contrast with both federal and state precedent, the Court of Appeals decided in the case at bar that a public school teacher could be dismissed *in the absence* of the objective standards required by the Fourteenth Amendment to the U. S. Constitution.[3] The court reasoned that the uniform criteria required to discharge teachers for other reasons are not constitutionally mandated in dismissals for incompetency. It stated that a lack of "objective standards" for dismissals involving such causes as "excessive absenteeism, sex offenses, or drug violations" would "vest unbridled discretion in the districts and trial courts" but that such a danger is not present in incompetency discharges because of the

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The conduct proscribed under subdivision (m), 'discourteous treatment . . . of . . . other employees', though more specific than such terms as 'unprofessional' or 'immoral' conduct, can literally extend over a wide range of conduct and thereby be subject to the constitutional objection of vagueness unless it is limited by guidelines which fairly apprise an employee of the type of misbehavior which may subject him to disciplinary action and against which his conduct may be rationally judged by courts and administrative agences. 25 C.A. 3d. at 550. *See also McMurtry v. State Board of Medical Examiners*, 180 C.A. 2d. 760, 4 Cal. Rptr. 910 (1960).

[3]The due process deficiencies in this action were exacerbated by the fact that respondent LIVINGSTON UNION SCHOOL DISTRICT failed to even evaluate petitioner in comparison with other eighth grade teachers as noted above. Such a failure proved fatal in two recent cases which bear a marked similarity to this matter. In *Williams v. Pittard*, 604 S. W. 2d 845 (Tenn. 1980) a teacher was discharged for her inability "to maintain appropriate control of her class." 604 S. W. 2d. at 848. Because there was no objective showing that her "standard of efficiency" was actually lower than that of the other teachers, 604 S. W. at 850, she was reinstated. Similarly, in *Hollingsworth v. Board of Education of School District of Alliance*, 303 N. W. 2d. 56 (Nebraska 1981) the teacher was dismissed because he was "unable to control his classroom and to handle students' misbehavior." 303 N.W. 2d, at 508. The principal's evaluation was "suspect", however, because "he failed to compare Mr. Hollingsworth's performance with other staff members' performances." In reversing the discharge, the court stated that incompetency "must be measured against the standard required of others performing the same or similar duties." 303 N. W. 2d. at 512-513.

"allegations of specific conduct" of which the teacher has notice. (Appendix A, *infra*, page 13.) This rationale, however, entirely misses the point.

The issue is not whether petitioner had notice of the specific allegations against her. The teacher in *San Dieguito, supra*, received numerous such notices. 185 Cal. Rptr. at 205. As the Supreme Court stated in *Morrison, supra*, the question is whether there is a "*standard* or *guide* against which conduct can be uniformly judged by courts and administrative agencies." (emphasis mine) 1 Cal. 3d. at 230. The need for such guidelines exists equally in incompetency cases and dismissals for other causes.

There can be no question that the "establishment and maintenance of a suitable learning environment" is just as vague and ambiguous a phrase as "immoral conduct" or "moral turpitude". In fact, within the teaching profession there would probably be more agreement about what constitutes "immoral conduct" than about the meaning of "suitable learning environment."

In *Morrison, supra*, the court thought it was significant that a recent study by the California State Assembly had demonstrated that educators differed among themselves regarding the meaning of "unprofessional conduct." 1 Cal. 3d. at 225. A study of the scholarly writing in the field of education on the subject of student discipline and control of the classroom shows that there is more disagreement and debate among educators about what constitutes a "suitable learning environment" than about almost any other issue confronting teachers today. As the literature notes,

> . . . there is no universal agreement on means or methods, or even on what behavior should be controlled. Debates rage over these matters in the courts, in the journals, and at school board meetings. Out of all this come the programs, the rules, the regulations, and methods of governing the control of disruptive student behavior. Dunlop, *Should Methods to Deal With Student Discipline Be Negotiated With Teacher Organizations?*, The NEA Perspective, 6 J. of LAW and EDUCATION 63, 66 (1977).

The difficulty of assessing whether proper control is being maintained is discussed in an enlightening law review article on the subject:

> [T]he need for order must be viewed in the context of the goals of quality education; chaos and disruption which have been created for their own sake must be distinguished from that short-term commotion which always accompanies sudden interest or discovery and which leads to long-term involvement and order; deviations from the prescribed curriculum which represent inefficient use of class time must be distinguished from those which are intended to achieve a legitimate educational objective . . .
>
> The maintenance of order in classroom and school is not a sufficient prerequisite to quality education; equally necessary is the maintenance of that degree of teacher classroom flexibility which will enable the teacher to capitalize on those opportunities to convey the skills of perception, analysis, and creativity, even though the method he chooses may be offensive to some and temporarily disruptive." Note, *Teacher Classroom Flexibility*, 47 SO. CAL. L. REV. 1528, 1529, 1544-45 (1974).

Because of the absence of objective standards and the widely disparate views which exist among teachers on the subject of discipline, the situation which was foreseen by the court

in *San Dieguito, supra* at 208, occurred in the case at bar. Contrary to constitutional mandate, petitioner was discharged because, in the subjective estimation of her principal and respondent GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT, she did not maintain control over her class.

For example, in the instant case the allegation that petitioner was observed ignoring disruptive and inappropriate behavior was viewed as substantial evidence of her inability to maintain a "suitable learning environment." A significant number of renowned educational experts, however, contend that petitioner's "ignoring" response, far from showing incompetence, demonstrated the *most effective* and best approach to a discipline problem.

As noted by Workman, Kensall, and Williams:

> A number of investigations have clearly demonstrated that students' disruptive and off task behaviors in the classroom can be modified through the use of systematic praise for appropriate behaviors and ignoring of inappropriate behaviors. "The Consultative Merits of Praise-Ignore Versus Praise-Reprimand Instruction," 18 JOURNAL OF SCHOOL PSYCHOLOGY 373, 373 (1980).

The Workman research concluded that the "praise-ignore combination" resulted in "more long-lasting effects" on student discipline and was a far more effective educational technique than the use of reprimands or sharp verbal rebukes to control behavior. *Workman, supra* at 378. *See also* Copeland and Hall, "Behavior Modification in the Classroom", in Hensen, Eisler, and Miller, eds. PROGRESS IN BEHAVIOR MODIFICATION, Vol 3 (Academic Press 1976); Madsen, Madsen, Saudargas, Hammond, Smith, and

Edgar, Classroom RAID (Rules, approval, ignore, disapproval): A Cooperative Approach for Professionals and Volunteers, 8 JOURNAL OF SCHOOL PSYCHOLOGY 180-185 (1970); Hymand and Lally, Discipline in the 1980's — Some Alternatives to Corporal Punishment, 11 CHILDREN TODAY 10, 12 (Jan-Feb. 1982); Thoresen, ed., BEHAVIOR MODIFICATION IN EDUCATION, The 72nd Yearbook of the National Society for the Study of Education, Part 1, 90, 192 (U. of Chicago Press 1973).

In fact, the *ability* to ignore disruptive student behavior is viewed by many educators as a rare talent. According to Laurel Tanner the "ignore" technique "is not necessarily the easiest strategy . . . The inability to ignore is the great weakness of many otherwise good teachers." CLASSROOM DISCIPLINE FOR EFFECTIVE TEACHING AND LEARNING (Hall, Rinehart, and Winston 1978) at 161.

From the perspective of the more traditional administrators in Livingston, California, a small farming town in the San Joaquin Valley, the environment in petitioner's classroom might not have been sufficiently controlled or orderly. However, to the thousands of both public and private school teachers who now employ the "open instruction" techniques used in Great Britain for decades, the atmosphere in petitioner's classroom probably would have appeared too rigid and authoritarian to encourage maximum learning.

In the "open classroom", several small groups are engaged in different types of activities and students are encouraged to move around the classroom and to speak out spontaneously. Charles Silberman, CRISIS IN THE CLASSROOM: THE REMAKING OF AMERICAN EDUCATION 290

(Random House 1970). This "open classroom" concept is an established and well-recognized approach to teaching. Over two hundred separate studies of the method have validated its effectiveness. Walbert, ed. EDUCATIONAL ENVIRONMENTS AND EFFECTS: EVALUATION, POLICY, AND PRODUCTIVITY 276 (McCutchan Press 1970). In spite of the success of the "open classroom", however, the teacher who elects to adopt this educational technique is sometimes faced with a "principal who complains about the noise or about children moving about." Silberman, CRISIS, *supra* at 290.

Petitioner's classroom was considerably more traditional and authoritarian than the true "open classroom." Petitioner's disciplinary methods, however, borrowed some of the "open classroom" approaches which have proven successful. It is indeed ironic that such techniques form the basis of the allegations against petitioner.

It is the purpose of the Due Process Clause of the Fourteenth Amendment to protect such decision-making from arbitrary attack. As the court noted in *Morrison, supra,* the requirement of narrow, uniform guidelines assures that teachers "cannot be disciplined merely because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagreed." 1 Cal. 3d. at 233. *See also Lindros v. Governing Board of Torrance Unified School District,* 9 C. 3d. 524, 538 108 Cal. Reptr. 185, 510 P. 2d. 361 (1973).

CONCLUSION

For the foregoing reasons petitioner respectfully prays that this petition for a writ of certiorari be granted.

Dated, Fresno, California,

November 4, 1983.

Respectfully submitted,

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APPENDIX A

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FILED
June 30, 1981
Merced County Clerk
By DEBRA DEAN
Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

CTA; MITSUE TAKAHASHI,
Petitioners,

v.

LIVINGSTON UNION SCHOOL DISTRICT, et al.,
Respondents.

No. 65267

JUDGMENT DENYING WRIT OF MANDATE

The above-entitled action came on regularly for hearing on May 1, 1981 in the above-entitled Court, The Honorable Donald R. Fretz, presiding; Ernest H. Tuttle III appearing for petitioners and Paul M. Loya appearing for respondent.

Upon the verified Petition of petitioner, the Answer of respondent and Points and Authorities submitted by both parties; upon the Court's application of the independent judgment test and review and examination of the records, transcripts, exhibits, evidence and decision in the administrative proceedings of the Commission on Professional Competence; and upon arguments having been presented and the matter having been submitted for decision and the Court

having made Findings of Fact and Conclusions of Law, which have been signed and filed,

IT IS ORDERED THAT:

1. The Petition filed herein for Writ of Mandate is denied.

2. The action on file herein is dismissed.

3. Petitioner be granted no relief by virtue of his Petition.

4. Respondent shall recover costs.

Dated: June 9, 1981.

DONALD R. FRETZ

Judge of the Superior Court

Court of Appeal
Fifth Appellate District
FILED
JUNE 20, 1983
Kevin A. Swanson, Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CALIFORNIA TEACHERS ASSOCIATION et al.,
Plaintiffs and Appellants,
v.
GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT et al.,
Defendants and Respondents.

5 CIVIL No. 6622
(F000235)

(Super. Ct. No. 65267)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Donald R. Fretz, Judge. Affirmed.

Tuttle & Tuttle, Ernest H. Tuttle III and Kay M. Tuttle for Plaintiffs and Appellants.

Mary Louise Frampton as Amicus Curiae on behalf of Plaintiffs and Appellants.

Atkinson, Andelson, Loya, Ruud & Romo, Paul M. Loya and Brian M. Libow for Defendants and Respondents.

Plaintiffs, California Teachers Association (CTA) and Mitsue Takahashi, appeal from the trial court's judgment which denied a writ of mandate commanding defendants, the Governing Board of the Livingston Union School Dis-

trict, the Commission on Professional Competence of the Livingston Union School District and the Livingston Union School District (district) to set aside their decision terminating the district's employment of Takahashi, a permanent certified schoolteacher. We affirm the judgment.

The principal issue on appeal is whether the district's failure to adopt uniform objective guidelines for evaluation and assessment of the classroom management performance of all its certificated personnel, pursuant to Education Code section 44660[1] et seq. (the Stull Act)[2] precludes it from giving to the affected employee a valid 90-day written notice of charges of incompetency as required by section 44938.[3]

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[1]Section 44660 provides as follows:

"It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district or, for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district be subject to a system of evaluation and assessment adopted pursuant to this article.

"This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes."

All statutory references are to the Education Code unless otherwise specified.

[2]Statutes 1971, chapter 361, section 40, page 726.

[3]Section 44938 provides as follows:

"The governing board of any school district shall not act upon any charges of unprofessional conduct or incompetency unless during the preceding term or half school year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct or incompetency, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee and opportunity to correct his faults and overcome the grounds for such charge. The written notice shall include the evaluation made pursuant

STATEMENT OF FACTS

Mitsue Takhashi was an eighth grade teacher at Selma Herndon School in the Livingston Union School District in Livingston, California. She had been employed by the district, at the time of the hearing before the Commission on Professional Competence, for a period of 21 years. On five occasions, during the period from January 9, 1978, through May 16, 1979, Dale Eastlee, principal at Selma Herndon School, observed discipline problems in the classroom of Takahashi. These problems included students fighting, playing soccer in the classroom, yelling over the school intercom, yelling out the back door of the classroom, wrestling, throwing pencils and other disruptive activities. Additionally, a maintenance worker who was working in Takahashi's classroom on May 8, 1978, overheard students using vulgar language. He did not hear Takahashi take any action to terminate use of that language or to caution against recurrence.

In August 1979, Hamilton Brannan became principal at Selma Herndon School. He observed Takahashi's classroom on six occasions between September 26, 1979 and March 20, 1980. Each time, he noted a lack of planning and focus in Takahashi's teaching. He once heard a student screaming at Takahashi for so long with no response from Takahashi that he was forced to remove the student from the classroom. He observed students engaging in a tug-of-war over some tape, which Takahashi was unable to stop, and students disregard-

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to Article 11 (commencing with Section 44660) of Chapter 3 of this part, if applicable to the employee. 'Unprofessional conduct' and 'incompetency' as used in this section means, and refers only to, the unprofessional conduct and incompetency particularly specified as a cause for dismissal in Sections 44932 and 44933 and does not include any other cause for dismissal specified in Section 44932."

ing Takahashi's instructions on classroom demeanor in shouting out questions and answers. On April 15, 1980, at the request of Brannan, a principal at a school in a neighboring district observed Takahashi's classroom performance. That person, from outside the district, noted that Takahashi's questions to the class prompted loud and confusing total group responses, that she failed to draw any response from the quieter students, and that she ignored inappropriate student behavior which resulted in an unorderly classroom environment. Twice during the 1979-1980 school year students were transferred out of Takahashi's class at the request of the students' parents. The reasons stated for the transfer were disorder and lack of discipline in the classroom which interfered with the students' learning.

On January 8, 1980, the superintendent of the district handed Takahashi a letter over his signature notifying her of specified acts of incompetency. Appended to that letter was a formal evaluation form dated November 15, 1979 prepared by Brannon, a copy of a letter from the superintendent to Takahashi dated April 23, 1979, also notifying her of specified acts of incompetency, and a copy of a formal evaluation form prepared by Dale Eastlee, dated April 18, 1979. Later, a notice of accusation, dated June 26, 1980, was served upon Takahashi. Appended to that notice was an accusation filed with the governing board of the district alleging that cause existed to dismiss Takahashi. Takahashi demanded and received a hearing before the Commission on Professional Competence (commission) of the district, Rudolph H. Michael, Administrative Law Judge, presiding. On November 6, 1980, the commission issued its decision containing findings of fact and determining, among other things, that the cause

for dismissing Takahashi had been established and that the notice given to her on January 8, 1980, complied with the procedural requirements of section 44938.

Takahashi commenced a proceeding in mandamus (Code Civ. Proc., § 1094.5) to compel the commission to set aside its decision. In that proceeding, the trial court found as follows: (1) cause for dismissal had been established, (2) each of the notices which the district gave Takahashi complied with the procedural requirements of section 44938 and the evaluations attached to those notices complied with section 44660, et seq. and (3) Takahashi's alteration of her testimony before the commission constituted unclean hands.

DISCUSSION

Jurisdiction To Act Upon The Accusation Of Incompetency

Initially, we note that the trial court's determination that the notice given to Takahashi on January 8, 1980, complied with the procedural requirements of section 44938 necessarily involves interpretation of the statute. Such interpretation is a question of law, and an appellate court is not bound by evidence presented in the trial court. (*California Teachers Assn.* v. *San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.) In construing a statute, the fundamental rule is that the appellate court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Palos Verdes Faculty Assn.* v. *Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658.) To ascertain such intent the court first looks to the words themselves for the answer. (*Ibid.*) Moreover, the court is required to give effect to statutes according to the usual, ordinary import of the language employed in framing them.

(*Id.*, at pp. 658-659.) The various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. (*Id.*, at p. 659).

Applying these rules to interpret the Stull Act, we begin with section 44660. That section expresses the intent of the Legislature that governing boards ". . . . establish a uniform system of evaluation and assessment of the performance of all certificated personnel . . . The system shall involve the development and adoption . . . of objective evaluation and assessment guidelines . . ." *Nowhere in section 44660 is there any statement about the consequence to the district of the governing board's failure to establish such a system or to adopt such guidelines.* Neither do we find in other sections of the Stull Act a statement that any disability or consequence flows from the failure to adopt guidelines for evaluation and assessment of the performance of certificated employees.

We do find in section 44932 specific provisions which limit the causes for dismissal of permanent employees. One of the causes for dismissal is "incompetency" (§ 44932, subd. (d)). In the second paragraph of section 44934 appears the requirement that "Any written statement of charges of . . . incompetency shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his defense. It shall . . . also set forth the facts relevant to each occasion of alleged . . . incompetency." Section 44938 provides additional requirements which must be satisfied before the governing board of any school district may act upon any charges of incompetency. These provisions include the requirement that the written notice shall include the evaluation made pursuant to section 44660 et seq.

Plaintiffs do not contend that incompetency is not a proper cause for dismissal of Takahashi. Neither do they urge any procedural deficiency in the contents of the notices of incompetency under the statutory provisions reviewed above. Their sole contention is that the Stull Act evaluation appended to the notice of incompetency given to Takahashi on January 8, 1980, does not satisfy the requirement of section 44938 that the evaluation be made pursuant to section 44660 et seq. Plaintiffs argue the evaluation could not have been made as required in the absence of the guidelines mandated by section 44660.

In *Tarquin* v. *Commission on Professional Competence* (1978) 84 Cal. App. 3d 251, the court addressed the issue of compliance with section 13407. That section is identical with section 44938 of the Reorganized Education Code (Stats. 1976, ch. 1010, as amended by ch. 1011, eff. April 30, 1977). The court concluded that the district did not comply with section 13407 for several reasons. One reason was the district's failure to comply with section 13489 (now § 44664) by not giving the teacher an evaluation of his performance during the school year in which he was given notice of his alleged incompetency. The district was, therefore, without jurisdiction to proceed on the charges of incompetency. (*Id.*, at pp. 258-259.)

Plaintiffs do not dispute the fact that an evaluation of Takahashi's performance accompanied each of the notices of incompetency. In the notices, the district described the attached evaluations as having been made pursuant to section 44660 et seq. We believe the evaluations which the district attached to the notices of incompetency to Takahashi complied with the provisions of section 44664. They were pro-

vided within the time limits specified in that section. In addition, they included recommendations as to areas of improvement in the performance of Takahashi as required by that section. They also contained a notice to Takahashi in writing that she was not performing her duties in a satisfactory manner and they described such unsatisfactory performance. Finally, the evaluators conferred with Takahashi after the evaluations and made specific recommendations as to areas of improvement in her performance. They also provided assistance to her in improving her performance. This assistance included provision of textbooks and a course of instruction on improving classroom discipline and control and visits to other classrooms.

We find nothing in the *Tarquin* decision to support a conclusion that the district lacked jurisdiction to proceed on the charges of incompetency against Takahashi. Neither do we beslieve it is logical or reasonable to conclude that it was the intent of the Stull Act that such be the consequence of failure of the district's governing board to adopt guidelines for assessing teacher incompetency. The numerous safeguards which the framers of that legislation included to assure full and complete due process in any attempted dismissal are inconsistent with such an intent. The requirement of a full statement of the charges and a specification of the acts, omissions and facts relevant to each occasion of alleged incompetency are but a few of these safeguards. Additionally, we note the provisions of section 44944 governing the conduct of the hearing by the Commission on Professional Competence on the charges against the teacher and governing the composition of the Commission. The two members selected by the governing board and the teacher must hold a current-

ly valid credential and "have at least five years' experience within the past ten years in the discipline of the employee." (§ 44944, subd. (b).)

One final consideration arising from the particular nature of the charged incompetency in the present case convinces us that the Legislature never intended that failure to adopt the uniform written guidelines called for by section 44660 result in a wholesale jurisdictional bar to the dismissal of incompetent employees. The essence of the charge against Takahashi was that she was unable to maintain an orderly classroom.[4] Maintenance of appropriate classroom behavior is extremely difficult to quantify; one can imagine (with horror) uniform guidelines framed in terms of permissible decibel levels or schedules of acceptable incidents of misbehavior per unit of time or student population. The lack of empirical standards applicable to this area of teacher competence mandates that evaluation of teacher performance be left to those with the professional experience and skill to meaningfully assess classroom order — fellow educators assisted by a judicial officer, as is contemplated by section 44944.

The only extrinsic aid to interpretation provided by the briefs is the reference by the amicus curiae to a law review article written by the author of the Stull Act,[5] the legislation

[4]It is undisputed that Takahashi's students met the academic standards appropriate to measure the skill with which she imparted information relevant to the subjects she covered. We view as no less important than academic knowledge the teaching of standards of civilized behavior necessary to the functioning of society. Order and discipline should never be exalted to the detriment of learning or of the concepts basic to a free society, but neither should appropriate group behavior be discarded as irrelevant to the educational process. A school which produced well-educated sociopaths would be as inimical to democracy as one which created well-educated robots.

which enacted the relevant provisions of the Education Code.

In construing a statute, the motives or understandings of individual legislators who cast their vote for it may not be considered as evidence of legislative intent. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589.) This rule applies even though the motives offered are those of the author of the legislation being construed. (*Id.*, at pp. 589-590.) A legislator's statement is evidence of legislative intent only if it provides the history of the legislation — events which occurred or arguments made during its passage. (*California Teachers Assn.* v. *San Diego Community College Dist.*, *supra*, 28 Cal.3d 692, 700; *In re Marriage of Bouquet*, *supra*, at p. 590.) These standards for consideration of legislators' statements go to admissibility, rather than weight, of the evidence offered. (*California Teachers Assn.*, *supra*, at p. 701.)

Nothing in the article written by Mr. Stull is a reiteration of legislative discussion or events or gives an indication of arguments made during consideration of the statute by the Legislature. Therefore, this court may not consider that article as evidence of the Legislature's intent in enacting the Stull Act.

We have discovered only one judicial expression of statutory interpretation relevant to the Education Code sections at issue. That appears in *Certificated Employees Council* v. *Monterey Peninsula Unified Sch. Dist.* (1974) 42 Cal.App. 3d 328. In that case a school district had adopted the guidelines called for by section 44660, and teachers' unions sought to enjoin application of the guidelines because the district had not consulted with the teacher organizations (but had

[5]Stull, *Why Johnny Can't Read — His Own Diploma* (1979) 10 Pacific L.J. 647.

utilized individual teachers) in formulating the guidelines. (*Id.*, at pp. 331-332.) In holding that the Stull Act was not subject to the "meet and confer" requirements of other legislation, the Court of Appeal stated:

> "Nor do we think that the Stull Act is exclusively a tenure regulation. As indicated above, in Stull, 'intent of the Legislature [was] to establish a uniform system of evaluation and assessment of the performance of certificated personnel' by requiring 'the development and adoption by each echool district of objective evaluation and assessment guidelines' (§ 13485 [recodified as 44660 by Stats. 1976, ch. 1010, § 2, p. 2384]). Stull does not require that school districts use the guidelines for determining tenure *nor does it require any other consequence. While many school districts will undoubtedly utilize the evaluation and assessment guidelines in making determinations of tenure, in and of itself this fact does not make them tenure regulations.*" (*Id.*, at p. 336, emphasis supplied.)

We interpret the opinion in *Certificated Employees Council* v. *Monterey Peninsula Unified Sch. Dist., supra,* 42 Cal.App.3d 328 to mean that the failure of the district to establish guidelines as required by section 44660 does not have any effect upon the district's powers. Admittedly, that court was not presented with factual circumstances in which any consequences could arise, since the district there had adopted the required guidelines. Nonetheless, we believe an interpretation of sections 44660 and 44938 which entirely prevents the district from dismissing incompetent teachers would not be consonant with that court's view of the Stull Act.

Plaintiffs argue that guidelines are essential to an objective evaluation and that the importance of such an evaluation

justifies the consequence they assert in this case. To illustrate the importance of the objective standards, our attention is directed to *San Dieguito Union High School Dist.* v. *Commission on Professional Competence* (1982) 135 Cal.App.3d 278. We do not find that case material to the resolution of the issue of whether failure to adopt guidelines for assessing teacher incompetency precluded compliance with section 44938 in this case. *San Dieguito* and the cases cited therein uniformly involve causes for dismissal other than incompetency — such as excessive absences, sex offenses, or drug violations. The danger in such situations (where the offense purporting to justify dismissal involves questions of moral turpitude or unfitness to teach) that a lack of objective standards will vest unbridled discretion in the districts and trial courts, is not present where incompetence is alleged and is, as in this case, supported by allegations of specific conduct. The evidence presented to the commission, and upon which the trial court exercised its independent judgment, established that Takahashi received notice of the allegations of incompetence far in advance of the filing of accusations of incompetency; she was provided with suggestions for improvement; and she was given an opportunity to demonstrate improvement in her performance in the relevant particulars. If, as we believe, the Stull Act was intended to encourage regular evaluations and to avoid arbitrary evaluations and dismissals, common sense dictates there was compliance with section 44938 in this case.

Sufficiency of the Evidence

The decision of the Commission on Professional Competence, which the trial court reviewed pursuant to plaintiffs' petition for writ of mandate, found cause for dismissal of a

permanent certified employee of the school district. On such a review, the trial court must exercise its independent judgment as to the evidence presented to the commission. (*Pasadena Unified Sch. Dist.* v. *Commission on Professional Competence* (1977) 20 Cal.3d 309, 314; *San Dieguito Union High School Dist.* v. *Commission on Professional Competence, supra,* 135 Cal. App.3d 278, 283.) The trial court applied the independent judgment standard in the present case.

The trial court's judgment must be upheld on appeal if supported by substantial evidence. (*Ibid.*) All conflicts in the evidence must be resolved by the appellate court in favor of the party prevailing in the superior court, and that party must be given the benefit of every reasonable inference in support of the judgment. (*Pasadena Unified Sch. Dist.* v. *Commission on Professional Competence, supra,* at pp. 313-314.) Where the trial court's findings are challenged, based on insufficiency of the evidence, the appellant bears the heavy burden of showing that there is no substantial evidence to support those findings. (*Division of Labor Law Enforcement* v. *Transpacific Transportation Co.* (1979) 88 Cal. App. 3d 823, 829.) The reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. (*Forman & Clark Corp.* v. *Fallon* (1971) 3 Cal.3d 875, 881.) The power of the appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. (*Ibid.*) Substantial evidence means evidence which is of ponderable legal significance — evidence that is reasonable in nature, credible and of solid value. (*H. Russell Taylor's Fire Prevention Service, Inc.* v.

Coca-Cola Bottling Corp. (1979) 99 Cal.App.3d 711, 726.) As the trier of fact, the trial court is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for so doing, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonably deducible from the evidence. (*Johnson* v. *Pacific Indem. Co.* (1966) 242 Cal.App.2d 878, 880.)

Applying the above rules to the present case, we conclude there was sufficient evidence to support the trial court's decision that "[i]n the aggregate, the events and facts [found by the court to be true] constitute cause for the dismissal of [Takahashi] . . ."

The judgment of the trial court is affirmed.

Hamlin, J.

WE CONCUR:

Andreen, Acting P. J.

Martin, J.

In the Court of Appeal of the State of California
in and for the Fifth Appellate District

Court of Appeal
Fifth Appellate District
FILED
July 14, 1983
Kevin A. Swanson, Clerk

CALIFORNIA TEACHERS ASSOCIATION et al.,

Plaintiffs and Appellants,

vs.

GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT et al.,

Defendants and Respondents.

5 CIVIL No. 6622
(F000235)

(Merced Co. Super. Ct. No. 65267)

ORDER MODIFYING OPINION AND DENYING REHEARING

BY THE COURT:

It is ordered that the opinion filed herein on June 20, 1983, and certified for publication in the Official Reports (_____ Cal.App.3d _____), be modified in the following particulars:

At the end of the incomplete paragraph at the top of page 14, add as footnote 6, the following:

[6]Our conclusion that failure to adopt uniform written guidelines for evaluation of a teacher's performance in the area of classroom order and discipline does not deprive a school district of jurisdiction to proceed with dismissal for incompetency does not mean that school districts may ignore the mandate of section 44660. We express no opinion as to what remedies may exist to compel school districts to comply with section 44660, but emphasize that a jurisdictional bar to dismissal proceedings for incompetency relating to classroom order and discipline is not one of them.

Appellants' petition for rehearing is denied.

Dated July 14, 1983.

Hamlin, J.

WE CONCUR:

Andreen, Acting P. J.

Martin, J.

CLERK'S OFFICE, SUPREME COURT

4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG. 17, 1983

I have this day filed Order

HEARING DENIED

BIRD, J. OF THE OPINION THAT THE PETITION SHOULD BE GRANTED.

In re: 5 Civ. *No.* 6622.

CALIF. TEACHERS' ASSN.;
MITSUE TAKAHASHI

vs.

GOVERNING BD. — LIVINGSTON UNION SCHOOL DIST., et al.

Respectfully,

Clerk

APPENDIX B

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Education Code § 44660.

> It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation an assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district, or, for compelling reasons be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.
>
> This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes.

California Education Code § 44662.

> (a) The governing board of each school district shall

establish standards of expected student achievement at each grade level in each area of study.

(b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to (1) the progress of students toward the established standards, (2) the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and (3) the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

CERTIFICATE OF SERVICE

I hereby certify that printed copies of the Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Fifth Appellate District for Petitioner Mitsue Takahashi in the above-captioned case have been served upon those parties listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 14th day of November, 1983, to:

Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
(original plus 40 copies)

Paul Loya, Esq.
ATKINSON, ANDELSON, LOYA, RUUD & ROMO
Attorneys at Law
1811 Santa Rita Road, Suite 102
Pleasanton, CA 94566
(one copy)

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on November 14, 1983, at Fresno, California.

FRESNO DAILY LEGAL REPORT

By D. M. Webster Jr.